IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. 334

UNITED STATES OF AMERICA,
Appellant,

vs.

SHORELINE COOPERATIVE APARTMENTS, INC., A CORPORATION; J. M. NICHOLSON; ROBERT R. LUMSDEN; NATHAN SUCHERMAN; MILTON TIRSLEY; FRANK FERRARO; HELEN FERRARO; JOHN J. CHALMERS; SAMUEL SILVERMAN; ARTHUR J. CASEY; MAURICE LIPKIN; CHARLES E. KOCH; CHARLES H. BRANDT; CLIFFORD CULLODEN; JEROME A. CUTLER; HARRY TARLER; EUGENE B. FEINGOLD; HERBERT S. KOHN AND IRVING KALLICK,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

PETITION OF APPELLEES ROBERT R. LUMSDEN, ARTHUR J. CASEY, CLIFFORD CULLODEN AND IRVING KALLICK, FOR REHEARING.

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Appellees respectfully apply to this Court, pursuant to Rule 33 of the Revised Rules of this Court, for a rehearing of the decision of this Court, and show in support thereof as follows:

No opinion was filed by the Court in this matter, nor any announcement made that an opinion would be filed. The reasons for the decision must be implied from the citation in the order of *Wood* v. *Miller Co.*, 333 U. S. 138, in which opinion this Court rejected certain grounds urged against the validity of the Housing and Renting Act of 1947.

It is submitted that this Court has misunderstood the grounds urged against the validity of the Housing and Renting Act of 1949, since most of them were not urged and could not have been urged against the validity of the Act of 1947.

The ground upon which the District Court invalidated the Act of 1949 was that Section 204 (j), the so-called "local option" provision, thereof was unconstitutional. This provision was not a part of the Act of 1947, either in its present form or any other form.

Nor can *Woods* v. *Miller Co., supra,* be applied to this section even by remote analogy. In that case the delegation was to a federal officer under federal control, and not to state agencies. Also in that case, there was no "unbridled" delegation of discretion as in the instant case. In the *Woods* case, the Court said (333 U. S. 138, 144):

> Under the present Act the Housing Expediter is authorized to remove the rent controls in any defense-rental area *if in his judgment the need no longer exists by reason of new construction or satisfaction of demand in other ways.* (Italics supplied.) The powers thus delegated are far less extensive than those sus-

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tained in *Bowles* v. *Willingham* (321 U. S. 503). Nor is there here a grant of unbridled administrative discretion. The standards prescribed passed muster under our decisions.

Likewise Section 209 of the 1949 Act, conferring upon the Housing Expediter the power to control evictions, was not a part of the 1947 Act; nor were the provisions of Section 202 (c) (1) of the Act of 1949, recontrolling apartment hotels in cities of 2,500,000 population, but not others in the same defense rental areas, or those in other areas (Appellee's brief, pp. 66 *et seq.*).

Although the Court did in *Woods* v. *Miller, supra,* determine that the war emergency had not terminated as of February 26, 1948 (the date of the opinion), it indicated in that opinion, as it has indicated consistently in other decisions, that it was not the intention of the Court to preclude further examination from time to time of the continuance of the emergency. Obviously a decision of the Court with reference to the continuance of an emergency can control only the situation then existing, since by their nature emergency conditions are not static, but necessarily involve a time element.

The argument of appellees that the 1949 Act is invalid because it denies the owner of rental property a fair return can hardly be said to be controlled by the decision in *Woods* v. *Miller, supra,* since the analogy of the public utility cases was not urged upon the Court in that case, or in any of the preceding cases, and in view of the further fact that the Act of 1949 enunciates for the first time the so-called "fair net operating income" mandate, which is the gist of this objection of appellees. (Appellees' brief, pp. 56 *et seq.*) In this respect, attention is invited also to the inapplicability of *Bowles* v. *Willingham,* 321 U. S. 515, 516, which

dealt with a static, frozen economy, in which, as the Court indicated, the intention was to deal with rentals on a "mass" basis, as distinguished from the provisions of the Act of 1949 dealing with individual rentals in an economy free except as to rentals.

The decision in *Woods* v. *Miller Co., supra,* likewise cannot be controlling (Appellees' brief, pp. 63 *et seq.*) with reference to the fact that the 1949 Act neither allows hearing nor judicial review. That argument was not raised in *Woods* v. *Miller, supra,* and was not applicable to the 1947 Act to the same degree that it is to the 1949 Act, in view of the inclusion of the latter of Section 206 (g).

Hence it is respectfully submitted that certain of the objections raised in the instant case cannot in any sense be controlled by *Woods* v. *Miller, supra,* and that certain other objections, in the form in which they exist under the 1949 Act, cannot be said to be fairly controlled by that decision.

The soundness of this conclusion is further illustrated by reference to the facts of the instant case. The present complaint was instituted for the purpose of enjoining appellees, owners of co-operative apartments, from seeking possession thereof for their own use, and is predicated upon the provisions of the 1949 Act. If the 1947 Act (to which alone *Woods* v. *Miller, supra,* applies) had still been in effect, this case could never have arisen, since under that Act, these appellees were clearly entitled to secure possession for their own use.

Appellees are of course placed in the position of attempting to guess what reasons lead the Court to make the present decision. Counsel recall two questions raised in oral argument by members of the Court which may conceivably indicate the basis of the Court's reasoning: (1) The fact that by its own terms the 1949 Act terminates in

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June of 1950; and (2) the implication that it is undesirable to compel tenants to return to the "unsatisfactory" housing accommodations which they occupied in 1940.

With respect to the termination of the Act in June of 1950, the attention of the Court is again urgently invited to the fact that the 1947 and 1948 acts likewise provided for automatic termination; and to the further fact that administration leaders, including the President himself in his forthcoming message on the State of the Union, are already clamoring for further extension of rent controls. With respect to the suggestion that it is undesirable to compel tenants to return to the "unsatisfactory" accommodations which they occupied in 1940, the answer would seem obvious. If the Government desires to improve the housing accommodations of tenants beyond what they are able to provide by their own efforts and resources, it should do so from general revenues, by direct or indirect subsidy, as has been done with the farmers and other segments of the economy, and not at the expense of the landlords alone. The present practice constitutes nothing more nor less than the expropriation of money from one class of persons for the benefit of another; and it is respectfully submitted that such a system constitutes confiscation of property and cannot by any rationalization of constitutional principals be brought into conformity with the due process requirements of the Fifth Amendment.

Attention is also respectfully invited to the fact that the order of the Court in the instant case, filed as it is without opinion, leaves not only the status of the present litigation, but the status of innumerable other pending cases involving various constitutional objections to the Rent Act, in a confused and unsatisfactory condition. The instant case is reversed, and it may be that the mandate to be issued by this Court will furnish sufficient instructions to guide the

District Court in disposing of the matter. It seems improbable, however, that such mandate will furnish adequate guidance for the disposition of other cases pending before single judge and three-judge District Courts. In the District Court for the Northern District of Illinois, Eastern Division, for example, there is now pending before a three-judge court the case of *Dixon Company et al.* v. *Shogren et al.*, Gen. No. 49-C-1090, in which are involved most of the issues presented in the instant case. Nor does the instant order clarify the status of the Housing and Rent Act of 1949 in various states which have availed themselves of the provisions of Section 204 (j). Since *Woods* v. *Miller Co., supra,* could make no reference to this section, there is no way of knowing, in the absence of an opinion, whether the Court has found Section 204 (j) unconstitutional but separable, or whether the Court has found that section valid; and, hence, impossible to know whether Texas, Wisconsin and certain other states are or are not controlled.

The rights and every day affairs of millions of tenants and property owners, both large and small, are dependent upon the determination of the Court in the instant case, and it is submitted that those rights remain confused and undetermined on the present state of the record in the instant case.

Appellees desire to suggest to the Court a further consideration. The effect of the present decision would seem to be to continue to hold in bondage the private property of millions of small landlords who have invested in those properties their life savings, and who have regarded those properties as their means of sustenance in old age. It would seem that a due consideration for these people would indicate a clear and full expression by the Court of the reasons which impel the Court to take the action here taken.

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WHEREFORE appellees respectfully urge that they be granted a rehearing; that the decision of the District Court be, upon further consideration, sustained; or that in the alternative the Court file an opinion clarifying the decision reached.

Respectfully submitted,

KENART M. RAHN,
GEORGE S. STANSELL,
Counsel for Certain Appellees.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

I, George S. Stansell, counsel for certain appellees, certify that the foregoing petition is presented in good faith, is true and correct, and is not filed for delay.

GEORGE S. STANSELL.